STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2004
v	No. 250166 Oakland Circuit Court
MAHIR G. DAOUD, Defendant-Appellant.	LC No. 1994-133324-FC

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of first-degree premeditated murder, MCL 750.316(1)(a), arising from the killing of his mother. The circuit court sentenced defendant to a mandatory term of life imprisonment without parole. Defendant appeals as of right. We affirm.

I

The victim was reported missing from her Troy home early on February 5, 1985. During the evening hours of February 4, 1985, the Toledo Police Department discovered a body inside a dumpster that someone had set on fire. After the Toledo police discovered the missing person report concerning the victim that the Troy police had filed, the two departments cooperated to identify the unidentified body found in Toledo. Dental records, x-ray films, and fingerprint comparisons positively identified the body as Teriza Daoud, defendant's mother.

In February 1985, the Troy police twice interviewed defendant concerning his whereabouts on the date his mother disappeared. The police identified defendant as a suspect at the time of the second interview, during which defendant permitted the police to search the vehicle he had been driving on February 4, 1985, and the police discovered that he had washed out the vehicle's back seat and trunk. But no arrest of defendant ensued because, according to the Troy police investigating the crime, defendant and the rest of the victim's family ceased cooperating with the police.

Defendant was not arrested for the victim's murder until May 21, 1994, when he jumped in front of a marked Detroit police vehicle and proclaimed that he had killed his mother ten years earlier. The Troy police then interviewed defendant, who waived his *Miranda*[1] rights and gave a detailed, tape-recorded account of his commission of the killing, disposal of the victim's body, and efforts to clean up evidence of the crime.

II

Defendant first contends that the circuit court erred by admitting into evidence his May 1994, tape-recorded statement to Troy police officers. Because the Michigan Supreme Court has already addressed the admissibility of defendant's statement to the Troy police officers, this issue presents a legal question regarding the applicability of the law of the case doctrine, which this Court considers de novo. *City of Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 134-135; 580 NW2d 475 (1998).

In June 1994, defendant was bound over on a charge of first-degree premeditated murder. Between June 1994 and the time of defendant's bench trial in June 2003, the circuit court held several competency hearings. One of the hearings, which extended over two years and several different hearing dates, addressed defendant's motion to suppress his statement to the Troy police because it occurred while defendant allegedly occupied a state of psychotic delusion. On October 22, 1998, the circuit court entered an opinion and order suppressing defendant's statement because his delusions rendered him unable to knowingly and intelligently waive his *Miranda* rights.

The prosecutor filed an interlocutory application for leave to appeal with this Court in Docket No. 215615. This Court reversed the circuit court's decision to the extent that it found inadmissible "[t]he first statement defendant made in response to police questioning, which occurred before he was transported to the police station . . . [and] was not the product of custodial interrogation[.]" *People v Daoud*, unpublished order of the Court of Appeals, entered January 11, 1999 (Docket No. 215615). This Court denied the prosecutor's application for leave "[i]n all other respects[.]" *Id.*

The prosecutor then filed an application for leave to appeal to the Supreme Court, which granted leave on September 29, 1999. 461 Mich 873. In a decision subsequently issued on July 20, 2000, the Supreme Court initially noted that "whether a waiver of *Miranda* rights is voluntary depends on the absence of police coercion," and that "[i]n the instant case, there is no question that defendant's decision to waive his *Miranda* rights, and, concomitantly, his decision to confess, was completely voluntary." *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000)(citation omitted). The Court next surveyed decisions addressing the knowing and intelligent prongs of *Miranda* waiver analysis, then rejected the circuit court's reasoning that to make a knowing and intelligent waiver, defendant had to "be able to 'apply (his *Miranda* rights) to himself and understand his relationship with the police.'" *Id*. at 636-639. The Court explained that the circuit court had applied an incorrect legal standard by focusing on

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

defendant's motivation for making his statement, instead of considering the appropriate inquiry whether defendant basically understood "that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him." *Id*. at 639-644. The Court reviewed the testimony of the Detroit and Troy police officers who spoke with defendant on May 21, 1994, and the testimony and reports of forensic psychologists Drs. Robert Charles Clark, Thomas Grisso, and Robert D. Mogy, and concluded that defendant clearly made a knowing and intelligent waiver of his *Miranda* rights. *Id*. at 625-628, 641-645. The Court reversed the circuit court's opinion and order suppressing defendant's confession. *Id*. at 645.

The law of the case doctrine precludes this Court from revisiting our Supreme Court's decision concerning the knowing and intelligent nature of defendant's confession.

> Under the law of the case doctrine, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals. [*Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000) (citations and quotation omitted).]

The Supreme Court ruled on the legal question of the knowing and intelligent nature of defendant's statement to the Troy police before the case returned to the circuit court for defendant's eventual trial. In reaching its decision, the Supreme Court plainly considered the same material facts on which defendant relies in his brief on appeal, primarily the reports by and testimony of psychologists Clark, Grisso, and Mogy. Nowhere in defendant's brief on appeal does he identify any specific material facts that the Supreme Court neglected to address, or any significant and material information concerning his confession that came to light after the Supreme Court's decision. Under these circumstances, this Court remains bound by the Supreme Court's ruling that defendant knowingly and intelligently made his statement,[2] and we cannot take action after remand inconsistent with the Supreme Court's judgment.[3] *Grievance Administrator, supra* at 259-260.

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[2] To the extent that defendant also mentions in his brief on appeal the involuntariness of his statement, we observe that the record contains no evidence of police misconduct, none of the psychological experts questioned the voluntary nature of defendant's statement, and, most importantly, the Supreme Court already considered these facts in finding that defendant's statement clearly qualified as voluntary. *Daoud*, *supra* at 635; *Grievance Administrator*, *supra* at 259-260.

[3] Although defendant cites *Locricchio v Evening News Ass'n*, 438 Mich 84, 109-110; 476 NW2d 112 (1991), and *People v Herrera (On Remand)*, 204 Mich App 333, 340-341; 514 NW2d 543 (1994), for the proposition that the law of the case doctrine occasionally may yield because

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III

Defendant next argues that his trial counsel was ineffective because he did not assert at trial an insanity or diminished capacity defense.[4] To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate the reasonable probability that but for counsel's errors the result of the proceedings would have been different and that the attendant proceedings were fundamentally unfair and unreliable. *Id*. at 312; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must overcome the strong presumption that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy. *Id.* at 715.

The record indicates that in 1997, defendant's trial counsel spoke extensively with Grisso, a nationally renowned insanity expert, and asked Grisso if he could develop an opinion regarding defendant's insanity at the time the victim was killed in 1985, but that Grisso declined that he could express such an opinion. The record of Grisso's testimony reflects that even his thorough investigation into defendant's mental health history revealed no evidence that he suffered from mental illness in 1985; Grisso testified that defendant did not begin to display any symptoms of mental illness until the late 1980s and that even then no one would have diagnosed defendant with a psychotic disorder. Defense counsel also discussed with Mogy in the mid to late 1990s whether he could attempt to recreate the status of defendant's sanity back in 1985, and Mogy similarly declined that he could do so. Defense counsel further asked Clark twice if he could attempt to reconstruct the status of defendant's mental condition at the time of the killing, and Clark likewise indicated that he could not. None of the information to which Dr. Jennifer Balay, who performed a competency examination of defendant in 1994, Clark, or Mogy testified suggests that defendant might have qualified as legally insane in 1985.

Nonetheless, after the Supreme Court's decision in 2000 concerning defendant's capacity to waive his *Miranda* rights, defense counsel still sought and obtained a criminal responsibility examination by the Forensic Center to attempt to ascertain the status of defendant's sanity in 1985, and the February 2002 examination concluded that in 1985 defendant "did not suffer from

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constitutional facts sometimes require independent review, we reiterate that the Supreme Court already plainly did review the constitutional facts involved in this case, and defendant offers no additional evidence that would have had relevance to the Supreme Court's determination of the instant constitutional facts. Further, the context of the cases cited by defendant are clearly distinguishable.

[4] To the extent that defendant suggests in his reply brief that the circuit court erred by denying his request for the appointment of an independent medical examiner to assess the issue of his insanity, defendant's promulgation of the issue in his reply brief does not suffice to properly present the issue for appellate review. MCR 7.212(G); *Check Reporting Services, Inc v Michigan Nat'l Bank-Lansing*, 191 Mich App 614, 628; 478 NW2d 893 (1991) (declining to address issues raised for the first time in the appellant's reply brief).

'a substantial disorder of thought or mood which significantly impaired judgment, behavior, capacity to recognize reality or ability to cope with the ordinary demands of life,'" and that defendant did not suffer a mental illness that impaired his "ability to appreciate the nature and quality or wrongfulness of his conduct or to conform his conduct to the requirements of the law."

In summary, neither the 2002 criminal responsibility examination nor any testimony by Balay, Clark, Mogy, or Grisso contains any suggestion that defendant had a serious mental disturbance in 1985. The apparent efforts by defense counsel to obtain an opinion concerning defendant's sanity at the time of the killing belie defendant's suggestion on appeal that he failed to properly investigate an insanity defense. Given the absence of support for such a defense from the four experts solicited, defendant has not overcome the strong presumption that defense counsel engaged in sound trial strategy by focusing elsewhere during trial, for example by attacking the credibility of defendant's statement to the police and the abundant evidence of premeditation on the basis of the evidence that defendant experienced delusions, and by arguing that no physical evidence tied defendant to the killing. Furthermore, defendant offers nothing beyond bare speculation in support of his suggestion that through additional efforts defense counsel may have been able to locate someone who might have opined that defendant was insane in 1985. Accordingly, we conclude that defense counsel was not ineffective because no indication exists that defendant was deprived of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

IV

Defendant lastly asserts that the circuit court clearly erred by determining that the evidence of his mental illness did not substantiate either an insanity or guilty but mentally ill defense. At trial, defense counsel waived appellate review of this issue, thus extinguishing any error, when during his closing argument he made clear that "I'm not presenting to this Court, nor have we been ever able to even consider presenting an insanity defense," and "[t]hat's the same with guilty but mentally ill. We can't present the issue, because we're nineteen years down the road here." *People v Carter*, 462 Mich 206, 208-209, 214-216; 612 NW2d 144 (2000).

Even assuming that defendant has not waived appellate review of this issue, the circuit court did not clearly err by finding that the evidence in the case did not support an insanity defense. MCL 768.21a; *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996). The 2002 criminal responsibility evaluation, the only evidence at trial that directly addresses defendant's criminal responsibility at the time he killed the victim, concludes that defendant did not then qualify as legally insane. As discussed in part III, *supra*, no contradictory evidence regarding defendant's sanity *at the time of the 1985 killing* exists within any of the other psychological experts' observations and conclusions. Given this record, we do not possess the definite or firm conviction that the circuit court made a mistake when it observed that "[t]his case is not about insanity."

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff